NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES' UNION

v.

MALAYA GLASS FACTORY BHD.

FEDERAL COURT, JOHOR BAHRU
WAN SULEIMAN FJ
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 172 OF 1979]
10 MAY 1984

LABOUR LAW: *Employment - Award of Industrial Court - Whether ultra vires - Whether without or in excess of jurisdiction - Provisions in award without jurisdiction - Whether severable.*

CIVIL PROCEDURE: *Appeal - Exercise of discretion by lower Court - Whether could be interfered with.*

On the reference of a dispute between the appellant and respondents under s. 26(2) of the Industrial Relations Act 1967, ("the Act") the Industrial Court handed down an award dated 30 June 1978, effective from 14 May 1977, fixing and determining the wages and terms and conditions of employment for all the workers of the respondent company. The respondent company applied successfully to the High Court for an order of *certiorari* to quash the award on the ground that as five articles in the award were *ultra vires* the Act, the Industrial Court had acted without or in excess of jurisdiction. The appellant appealed.

Held:

A. Law applicable

Only the state of law prior to the amendment to the Industrial Relations Act 1967, of 30 May 1980 was applicable, as the decision was made on 12 August 1978.

B. Jurisdiction

[1] Article 6 - Check-off. The Industrial Court acted outside its jurisdiction regarding this item. The item was not a condition of service. Consensual practice of employees and employers cannot expand the jurisdiction of the Industrial Court.

[2] Article 7 - Vacancies - promotion of serving employees. The question of lack of jurisdiction did not arise, as the inclusion of the provision was not contrary to s. 13(3) of the Act. In this instance, the right to *certiorari* might be lost by acquiescence or implied waiver. Further, the provision was included by the respondent company in its own proposal, and this was not forbidden by s. 13(3) (a) of the Act.

[3] Article 25 - Shift Allowance. The Industrial Court was within its jurisdiction. The terms being more favourable to the employee than those provided for in the Employment Act, s. 7A made them valid.

[4] Article 15 - Accident Leave. The combined effect of ss. 31 and 42 of the Employees' Social Security Act, 1969, debarred the appellant from making arrangements for additional benefits outside the above Act.

[5] Article 35 - Retrospective effect of award. Section 17(2) of the Act empowered the Industrial Court to make the retrospective order.

C. Severability

[1] This was an instance where the Court could properly interfere with the exercise of discretion by a lower Court.

[2] The award only in respect of Article 6 and 15 could be quashed. The severance of these two articles did not make what remained of the collective agreement unworkable. The Court can sever the good from the bad.

[Appeal allowed accordingly.]

Cases referred to:

South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors. [1980] 2 MLJ 165
Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304
The Queen v. Portus & Anor. [1972] 127 CLR 352
Bowman v. State & State Services Commission [1972] NZLR 78
Regina v. Arundel Justices Ex parte Jackson [1959] 2 WLR 798
Ratnam v. Cumarasamy & Anor. [1965] 1 MLJ 228

Legislation referred to:

Industrial Relations Act 1967, ss. 7A, 13(3), (3)(a), 17(2), 25, 26(2), 30(7), 32(3)(a)
Employment Act 1955, 60A(3)
Employees' Social Security Act 1969, ss. 31, 42

For the appellant - K.P. Gangadharan; M/s. John R. Gurusamy & Gangadharan
For the respondents - R.R. Chelliah (T.M. Varughese with him); M/s. Sethu, Ghazali & Gomez

JUDGMENT

Wan Suleiman FJ:

The respondent company applied for an order of *certiorari to* quash the award of the Industrial Court handed down on 30 June 1978 whereby the latter fixed and determined the wages, terms and conditions of employment for all the workers in the employment of the company.

The company and the union had entered into a collective agreement which was taken cognizance of by the Industrial Court. The agreement was for a period of three years beginning on 1 March 1974 and expiring on 28 February 1977.

When the collective agreement expired, negotiations were commenced for the purpose of making a new collective agreement. When their efforts to conclude this new agreement failed the Union resorted to industrial action on 8 October 1977. The Minister of Labour and Manpower then referred the dispute to the Industrial Court under s. 26(2) of the Industrial Relations Act 1967 on 14 October 1977. The Industrial Court handed down its award dated 30 June 1978, which was however effective from 14 May 1977.

The Industrial Court considered the case in full and in its award dealt with every article in the proposals and the collective agreement. It adopted 14 of the articles which had been agreed upon by both parties. It decided on 21 new articles which contain provisions disputed by either one or the other party. It left out 2 of the 37 articles without making any award to await the decision of the High Court.

The respondents referred to five articles in the award made by the Industrial Court saying that that part of the award is *ultra vires* the Industrial Relations Act 1967, and alleged that it had therefore acted without or in excess of jurisdiction.

The decision was made on 12 August 1978 and therefore it is common ground that we are concerned only with the state of the law prior to the amendment to the Industrial Relations Act 1967 of 30 May 1980. For ease of reference, s. 32(3) (a) (which was deleted by Act A484, s. 25 w.e.f. 30 May 1980) reads:

> Subject to this Act, an award of the Court shall be final and conclusive, and no award shall be challenged appealed against, reviewed, quashed or called in question in any Court.

Encik Gangadharan for the appellant concedes that because of the Privy Council decision in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 MLJ 165 at 166 -see also *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at 314 - for *certiorari* to apply there must be no jurisdiction or excess of jurisdiction on the part of the tribunal concerned.

It is also common ground that only 5 items or articles in the collective agreement before the Industrial Court are in dispute. Fourteen other items are not in dispute, and Encik Gangadharan, for appellant says that even if there had been excess or lack of jurisdiction as regards the five, the learned Judge should not have quashed the whole award. We shall in due course consider the doctrine of severability.

The first is Artticle 6 - "Check-off". The appellant thereby sought to get the respondents to deduct union subscriptions from Union members who have authorised the Company (respondents) to do so. Encik Gangadharan says that this is a continuation of what was already in practice under the previous agreement and therefore cannot be in excess of jurisdiction.

On behalf of respondents it was argued that this item is not a trade dispute as defined in s. 2 i.e. it is not connected with the employment or non-employment or the terms of employment or the conditions of work. It is not a condition of service. The previous collective agreement, continued Encik Chelliah, was a separate matter so that the Court acted in excess of jurisdiction.

He cited *The Queen v. Portus & Anor.* [1972] 127 CLR 352 as authority for the proposition that consensual practice of employees and employers cannot expand the jurisdiction of the tribunal. We are inclined to agree with him, and would hold that the Tribunal was, on this matter, acting outside its jurisdiction.

We shall next consider Article 7 of the collective agreement. Both parties had agreed to similar proposals submitted by both sides to the effect that when vacancies occur in higher grades, the company should give preference to promote serving employees. The respondent company however had subsequent misgivings, and in the Court below, submitted that the inclusion of such a provision in the collective agreement is contrary to s. 13(3) of the Industrial Relations Act 1967 which is set out below:

> Section 13(3) - Notwithstanding subsection (1), no trade union of workmen may include in its proposals for a collective agreement a proposal in relation to any of the following matters, that is to say-
>
> (a) the promotion by an employer of any workman from a lower grade or category to a higher grade or category.

Appellant says that the prohibition is on the trade union, and not on the employer. A glance at the words of s. 13(3)(a) will show that the appellant is correct.

Encik Gangadharan says that this is one instance where the right to *certiorari* may be lost by acquiescence or implied waiver, referring us to a passage at p. 423 of 3rd Edn. of de Smith.

We think that quite apart from the fact of acquiescence or implied waiver of jurisdiction on the respondents' part, is the undeniable fact that the company had itself included such a provision in its own proposal, something which s. 13(3)(a) does not forbid. The question of lack of jurisdiction therefore does not arise here.

The next ground deals with Article 25, shift allowance. In the Court below, and indeed before us, the stand taken by the company was that this was overtime payment which could at times be at a lower rate than that provided for in the Employment Act 1955.

Before us Encik Chelliah points out that the respondents' complaint is confined to the RM2 for "every hour of overtime" which this Article sought to obtain. This he says is contrary to s. 60A(3) of the Employment Act which entitles the worker to not less than one and a half times his hourly rate.

The Article is set out in full hereunder:

> **Article 25 - Shift Allowance (as awarded)**
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> Employees engaged in shift work shall be paid a shift allowance as follows:
>
> (i) 1st shift (7 a.m. - 3 p.m.) - NIL
> (ii) 2nd shift (3 p.m. - 11 p.m.) - 60 cents
> (iii) 3rd shift (11 p.m. - 7 a.m.) - 1.20
>
> The 2nd and 3rd shift workers are eligible to RM2 for every hour overtime.
>
> The above changes are found to be sufficient compensation for late hours of work.

On behalf of the appellant we were referred to the award on overtime - Article 9 at pp. 137/138 of the record, which it was submitted accorded with the provisions of the Employment Act. Hence the complaint is that the learned Judge had failed to make a distinction between shift allowance and overtime. The words "eligible to RM2 for every hour overtime" refers to a special rate of shift allowance to 2nd and 3rd shift workers who do work in excess of the normal shift hours, and this would be **in addition to** whatever overtime payments such workers are eligible to receive. Being therefore terms more favourable to the employee than those provided for in the Act, s. 7A makes them valid.

We agree with him that the Industrial Court was here well within its jurisdiction.

Article 15 deals with accident leave. The learned trial Judge held that this was contrary to the provisions of s. 31 of the Employees' Social Security Act 1969 which states *inter alia* that an insured person or his dependants shall not be entitled to receive or recover from the employer damages under any law for the time being in force. The mischief created by Article 15 of the award, he added would open the door to litigation against the employer, thus creating a new liability which s. 31 seeks to exclude. Before us, Encik Chelliah adds yet another objection. Section 42 of the same Act debars any person entitled to receive benefits under the Act from receiving any similar benefit from the provisions of any other written law. Article 15 would be in the latter category.

We are of the view that the combined effect of both these sections effectively debars appellant from making arrangements for additional benefits outside the Act.

The last ground concerns Article 35, wherein the Court made the award retrospectively from 15 May 1977. The learned Judge took the view that in the previous agreement the parties had provided that until a new agreement is executed the terms of the previous one would remain in force. It had no power to vary the terms of the old agreement, which is the effect of such retrospective order.

Encik Gangadharan however counters with s. 30(7) of the Industrial Relations Act, which, prior to the 1980 amendment reads:

> Section 30(7) - An award may specify the period during which it shall continue in force, and may be retrospective to such date as is specified in the award:
>
> Provided that the retrospective date of the award may not, except in the case of a decision of the Court under s. 33 or an order of the Court under s. 56(2)(c) or a decision of the Court on a reference to it under s. 20(3), be earlier than six months from the date on which the dispute was referred to the Court.

The previous agreement was for the period 1st March 1974 to 28 February 1977. Section 17(2) of the Act, he adds, also empowers the Court to make such retrospective order. We are satisfied that he is correct.

Jurisdiction to adjudicate on fourteen of the provisions of the collective agreement is conceded. We have held that three out of the five disputed ones are within jurisdiction. Encik Gangadharan says that the doctrine of severability may be invoked. That this Court can sever the good from the bad there is no doubt - (see pp. 105/106 of the same edition of de Smith earlier mentioned). This principle was for instance applied in *Bowman v. State & Stace Services Commission* [1972] NZLR 78 and *Regina v. Arundel Justices Ex parte Jackson* [1959] 2 WLR 798.

For the respondents Encik Chelliah argues that submissions had been made before the learned Judge on the exercise of his discretion whether to sever or not, and he had chosen not to. Our attention was drawn to *Ratnam v. Cumarasamy & Anor*. [1965] 1 MLJ 228 where their Lordships of the Privy Council said that it would not interfere with the discretion exercised by a lower Court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice.

After careful consideration we are satisfied that this is an instance where we can properly interfere with the exercise of that discretion. The severance of the two articles - Art. 6 - "Check off" and Article 15 - "Accident leave" do not in our considered view, make what remains of the collective agreement unworkable.

We would therefore allow the appeal to the extent that the order of the High Court quashing the whole award of the Industrial Court handed down on 30 June 1978 be set aside, and instead, severing good from bad, we order that only the award in respect of Article 6 and 15 be quashed.

Also found at [1984] 2 CLJ 9